

§ 23.61

§ 23.61 Can recipients use quotas or set-asides as part of their ACDBE programs?

You must not use quotas or set-asides for ACDBE participation in your program.

Subpart E—Other Provisions

§ 23.71 Does a recipient have to change existing concession agreements?

Nothing in this part requires you to modify or abrogate an existing concession agreement (one executed before April 21, 2005) during its term. When an extension or option to renew such an agreement is exercised, or when a material amendment is made, you must assess potential for ACDBE participation and may, if permitted by the agreement, use any means authorized by this part to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

§ 23.73 What requirements apply to privately-owned or leased terminal buildings?

(a) If you are a recipient who is required to implement an ACDBE program on whose airport there is a privately-owned or leased terminal building that has concessions, or any portion of such a building, this section applies to you.

(b) You must pass through the applicable requirements of this part to the private terminal owner or lessee via your agreement with the owner or lessee or by other means. You must ensure that the terminal owner or lessee complies with the requirements of this part.

(c) If your airport is a primary airport, you must obtain from the terminal owner or lessee the goals and other elements of the ACDBE program required under this part. You must incorporate this information into your concession plan and submit it to the FAA in accordance with this part.

(d) If the terminal building is at a non-primary commercial service airport or general aviation airport or reliever airport, you must ensure that the owner complies with the requirements in § 23.21(e).

49 CFR Subtitle A (10–1–11 Edition)

§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?

(a) Except as provided in paragraph (b) of this section, you must not enter into long-term, exclusive agreements for concessions. For purposes of this section, a long-term agreement is one having a term longer than five years.

(b) You may enter into a long-term, exclusive concession agreement only under the following conditions:

(1) Special local circumstances exist that make it important to enter such agreement, and

(2) The responsible FAA regional office approves your plan for meeting the standards of paragraph (c) of this section.

(c) In order to obtain FAA approval of a long-term-exclusive concession agreement, you must submit the following information to the FAA regional office:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the draft and final leasing and subleasing or other agreements. This long-term, exclusive agreement must provide that:

(i) A number of ACDBEs that reasonably reflects their availability in your market area, in the absence of discrimination, to do the types of work required will participate as concessionaires throughout the term of the agreement and account for at a percentage of the estimated annual gross receipts equivalent to a level set in accordance with §§ 23.47 through 23.49 of this part.

(ii) You will review the extent of ACDBE participation before the exercise of each renewal option to consider whether an increase or decrease in ACDBE participation is warranted.

(iii) An ACDBE concessionaire that is unable to perform successfully will be replaced by another ACDBE concessionaire, if the remaining term of the agreement makes this feasible. In the event that such action is not feasible, you will require the concessionaire to make good faith efforts during the remaining term of the agreement to encourage ACDBEs to compete for the purchases and/or leases of goods and

services to be made by the concessionaire.

(3) Assurances that any ACDBE participant will be in an acceptable form, such as a sublease, joint venture, or partnership.

(4) Documentation that ACDBE participants are properly certified.

(5) A description of the type of business or businesses to be operated (*e.g.*, location, storage and delivery space, “back-of-the-house facilities” such as kitchens, window display space, advertising space, and other amenities that will increase the ACDBE’s chance to succeed).

(6) Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE.

(7) Information on the estimated gross receipts and net profit to be earned by the ACDBE.

§ 23.77 Does this part preempt local requirements?

(a) In the event that a State or local law, regulation, or policy differs from the requirements of this part, the recipient must, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of this part.

(b) You must clearly identify any State or local law, regulation, or policy pertaining to minority, women’s, or disadvantaged business enterprise concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of this part. FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this part will govern.

(c) If not deemed in conflict by the FAA, you must write and administer such a State or local law, policy, or regulation separately from the ACDBE program.

(d) You must provide copies of any such provisions and the legal authority supporting them to the FAA with your ACDBE program submission. FAA will not approve an ACDBE program if there are such provisions that conflict with the provisions of this part.

(e) However, nothing in this part preempts any State or local law, regulation, or policy enacted by the governing body of a recipient, or the authority of any State or local government or recipient to adopt or enforce any law, regulation, or policy relating to ACDBEs, as long as the law, regulation, or policy does not conflict with this part.

§ 23.79 Does this part permit recipients to use local geographic preferences?

No. As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives an ACDBE located in one place (*e.g.*, your local area) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at your airport.

APPENDIX A TO PART 23—UNIFORM REPORT OF ACDBE PARTICIPATION

INSTRUCTIONS FOR UNIFORM REPORT OF ACDBE PARTICIPATION

1. Insert name of airport receiving FAA financial assistance and AIP number.
2. Provide the name and contact information (phone, fax, e-mail) for the person FAA should contact with questions about the report.
- 3a. Provide the annual reporting period to which the report pertains (*e.g.*, October 2005–September 2006).
- 3b. Provide the date on which the report is submitted to FAA.
4. This block and blocks 5 and 6 concern *non-car rental* goals and participation only. In this block, provide the overall non-car rental percentage goal and the race-conscious (RC) and race-neutral (RN) components of it. The RC and RN percentages should add up to the overall percentage goal.
5. For purposes of this block and blocks 6, 8, and 9, the participation categories listed at the left of the block are the following: “Prime Concessions” are concessions who have a direct relationship with the airport (*e.g.*, a company who has a lease agreement directly with the airport to operate a concession). A “subconcession” is a firm that has a sublease or other agreement with a prime concessionaire, rather than with the airport itself, to operate a concession at the airport. A “management contract” is an agreement between the airport and a firm to manage a portion of the airport’s facilities or operations (*e.g.*, manage the parking facilities). “Goods/services” refers to those goods and services purchased by the airport itself or by